United Nations A/C.6/52/SR.23

General Assembly
Fifty-second session

Official Records

Distr.: General
5 December 1997
English
Original: French

Sixth Committee

Summary record of the 23rd meeting
Held at Headquarters, New York, on Thursday, 6 November 1997, at 3 p.m.

Chairman: Mr. Tomka ..... (Slovakia)

Contents

Agenda item 147: Report of the International Law Commission on the work of its forty-ninth session (*continued*)

This record is subject to correction. Corrections should be sent under the signature of a member of the delegation concerned *within one week of the date of publication* to the Chief of the Official Records Editing Section, room DC2-750, 2 United Nations Plaza, and incorporated in a copy of the record.

Corrections will be issued after the end of the session, in a separate corrigendum for each Committee.

97-82607 (E)

The meeting was called to order at 3.10 p.m.

Agenda item 147: Report of the International Law Commission on the work of its forty-ninth session (*continued*) (A/52/10)

1. **Ms. Gao Yanping** (China) recalled, with regard to State responsibility, that the International Law Commission (ILC) had completed its first reading of the draft articles the previous year, after 40 years of effort. Her delegation was pleased with the Commission's decision to finish the second reading before the end of the current quinquennium. In view of the difficulties and urgency of the task, her delegation agreed that the Commission should make the topic a priority.

2. Successful completion of the second reading depended on appropriate handling of three issues. First of all, the issue of "State crime" and its legal consequences was problematic. Her delegation had stated repeatedly that the establishment of such a concept in international law would encounter almost insurmountable difficulties, given the maxims *par in parem non habet imperium* and *societas delinquere non potest*. It would be impracticable to determine and impose punishment for a "State crime" within the international community as currently structured. Draft article 19 on "State crimes", and the draft articles on their legal consequences in Part Two of the draft articles, should therefore be amended.

3. Secondly, it was necessary to take countermeasures against internationally wrongful acts. However, even if the entitlement of the injured State to take countermeasures was recognized, such countermeasures should be subject to certain restrictions. Although the draft articles in their current form were basically satisfactory in that regard, some problems remained. For example, while the injured State might consider the freezing of assets and the suspension of permission as interim measures of protection, the wrongdoing State might interpret such steps as countermeasures and unilaterally resort to arbitration. If the wrongful conduct ceased during the process of arbitration, the injured State should suspend its countermeasures. Issues such as the precise meaning of the term "interim measures of protection" would therefore need to be clarified during the second reading.

4. Thirdly, the provisions relating to settlement of disputes adopted in first reading were too rigid and lacked relevance and flexibility. The parties to a dispute should be allowed freely to choose the means of settlement. Her delegation agreed that the issue of settlement of disputes should be dealt with in the draft articles on State responsibility, but felt that, given the close linkage between settlement of disputes and countermeasures, the articles on means of settlement could be merged into a single article in the chapter on countermeasures.

5. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, she agreed with the Working Group's analysis of the 22 draft articles annexed to the Commission's previous year's report (A/51/10) and its comments on the direction of future work on the topic. "Prevention" and "liability" were the two major issues dealt with in the draft articles. Once it had adopted the draft articles relating to "prevention", the Commission would endeavour to complete its first reading of the draft articles over the next few years.

6. Article 1 defined the scope of the draft articles, namely, activities not prohibited by international law which involve a risk of causing significant transboundary harm. State responsibility would arise from the occurrence of harm if the State failed to implement the obligations set out by the draft articles on prevention while engaging in activities of that nature. On the other hand, if the State fulfilled its obligations under the draft articles and harm still occurred, that would give rise to "international liability", which was the core issue. As soon as the Commission completed its first reading of the draft articles on "prevention", it should proceed to the issue of "liability". The decision on whether there was a need to adjust the title of the topic should be made in the light of the content of the draft articles.

7. Diplomatic protection was a new topic which touched upon very complicated issues. When a legal person, such as a corporation, requested diplomatic protection, claims for compensation were usually brought by the State of nationality on behalf of the legal person. However, given that corporations, particularly multinational corporations, tended to have very complex structures, it could be extremely difficult to apply the rules of nationality in the context of a claim for compensation or other international laws to them. In accordance with international customary law, diplomatic protection should be invoked only after local remedies had been exhausted, and when it was invoked, State sovereignty and jurisdiction should be fully respected. Otherwise, aliens might actually enjoy privileges in their relationship with the host country and might be able to secure diplomatic interference at an unduly early stage by requesting their State of nationality to exert political pressure immediately, thereby jeopardizing the host State's sovereignty and judicial powers over persons under its jurisdiction.

8. Her delegation had taken note of the exceptions and alternative international remedies provided for in the general outline of the topic, including the right of recourse to human rights treaty bodies and to international tribunals competent in the field of foreign investment. Nevertheless, according to article 41, paragraph 1 (c), of the International Covenant on Civil and Political Rights, the Committee responsible for monitoring the Covenant could deal with a matter referred to it only after it had ascertained that all domestic remedies had been invoked and exhausted, in conformity with the generally recognized principles of international law. Again, on the issue of recourse to arbitration to settle investment disputes, although certain States might conclude arbitration agreements in that regard, that did not mean that the generally applicable principle of exhaustion of local remedies would automatically be put aside. On the contrary, all local administrative and legal remedies should be exhausted before resorting to arbitration. Explicit provision should be made for that principle.

9. Her delegation endorsed the analysis made by the Working Group of the Commission on the advisability and feasibility of considering the topic of unilateral acts of States. In international relations, States often carried out unilateral acts with the intent to produce legal effects. State practice in relation to unilateral legal acts was manifested in many forms and circumstances and there was sufficient material for the Commission to analyse and codify. Her delegation was in favour of changing the title to "unilateral legal acts of States". That would help to allay any fears that the major Powers might seek to secure recognition of their own unilateral acts. Consideration of the topic would help to clarify the functioning and legal consequences of such acts and thus strengthen the rule of law and bring certainty and stability to international relations. The focus should be on unilateral legal acts of States; unilateral acts of international organizations could be included in the Commission's long-term programme of work as a possible subject for future study.

10. **Ms. Škrk** (Slovenia) said that her delegation fully supported the conclusions of Mr. Pellet, Special Rapporteur on reservations to treaties, and further believed that the achievements of the Vienna regime should be preserved and given the value of international customary law. The regime had been envisaged as having universal applicability and there was therefore no need to establish a special regime for normative multilateral treaties, including human rights conventions.

11. In considering the permissibility of reservations, a delicate balance needed to be struck between the compatibility of a reservation with the object and purpose of a treaty and the consensual nature of the instrument. That balance was clearly difficult to achieve. The Special Rapporteur had obviously been guided by the principle of free consent in his assessment of the competence of human rights monitoring bodies; in his view, the primary role of those bodies was to monitor compliance with a treaty, although they might be accorded jurisdictional powers (the European Court of Human Rights) or a purely consultative mandate.

12. Her delegation agreed with the Special Rapporteur that it was essentially for States Parties to human rights treaties to decide whether they wished to continue to be Parties to a treaty and accordingly amend or suspend a disputed reservation, or whether they wished to denounce the treaty. The Preliminary Conclusions of the International Law Commission on reservations to normative multilateral treaties including human rights treaties, which had been adopted by the Commission, substantially reflected the views expressed by the Special Rapporteur in his second report. They therefore offered a good starting point for further discussion of that complex issue. The Commission had invited monitoring bodies established pursuant to human rights treaties to submit their comments on reservations to those treaties. That invitation was in accordance with the Statute of the Commission and in line with several recommendations that had been made during the Colloquium on the Codification and Progressive Development of International Law to the effect that the Commission should cooperate more closely with other bodies.

13. Her delegation welcomed the appointment of Mr. James Crawford as Special Rapporteur on State responsibility and was pleased to note that the Commission would begin the second reading of the draft articles on that subject at its next session. One of the key issues was how to define international crimes and delicts as embodied in article 19. In previous statements to the Sixth Committee, her delegation had supported the Commission's two-stage approach to dealing with the problem of acts of States which constituted a breach of an international obligation. It seemed unlikely that all breaches of international law could be treated on an equal footing, since certain acts could undoubtedly have more serious illegal consequences than others and could harm the interests of many States or, indeed, of the international community as a whole. Her delegation was fully aware of the practical and theoretical issues surrounding the distinction between international crimes and international delicts, including the question of the identification of a State injured by an international crime and the question of which State had the right to take *locus standi* at an international judicial body. It had to be admitted

that illegal acts which were defined by the Commission as international crimes did not necessarily affect the interests of all States with equal severity. The Commission should therefore re-examine the whole issue of international crimes and delicts with great prudence and care, taking into account the comments of Governments and international legal doctrine, which had, to a certain extent, expressed views on that sensitive issue. It was premature to take a firm position on countermeasures elaborated by the Commission, since the present system was based on the distinction between international crimes and delicts and was therefore contingent on the future definition of international crimes. Her delegation believed that, at the current stage, the Commission should preserve part three of the draft articles, concerning the settlement of disputes.

14. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, the Commission's approach, whereby it would first address the issue of prevention of transboundary damage from hazardous activities, seemed reasonable. However, it would be regrettable if the Commission did not continue its work on liability for hazardous activities with transboundary effects as a corollary to the legal regulation of the prevention of such activities.

15. Her delegation had initially supported the inclusion of the topic of diplomatic protection in the Commission's programme of work, since there was a growing practical need to codify international law in that area. The Commission had adopted a suitably rigorous approach in its report and had wisely decided to limit the topic to codification of secondary rules. However, some important aspects needed to be highlighted.

16. Firstly, the development of contemporary human rights law had inevitably altered traditional notions of diplomatic protection, although, on the international level, diplomatic protection should still be viewed primarily as the right of a State, not of an individual. The Commission should explore the subject carefully, including the legislative practice of States which already attributed the right of diplomatic protection to their nationals on the basis of domestic legislation. Another question which required detailed examination, one which the Commission had already raised, was whether a State could afford diplomatic protection to one of its nationals against a State whose nationality such person also possessed. The Commission could also add refugees to the list of persons requiring diplomatic protection, as they did not need to meet the criteria, such as long residence in the State espousing diplomatic protection, nor did they need to fit into the categories of persons established by the Commission.

17. As international trade relations expanded, the Commission needed to make a careful study of effective link criteria for determining the nationality of legal persons. Its initial approach to that issue seemed satisfactory.

18. With regard to diplomatic protection by international organizations, her delegation believed that since the number of international, regional and governmental organizations had grown immensely in the past decade, the functional diplomatic protection of those organizations formed an important part of contemporary diplomatic protection. However, it would be preferable for the Commission to complete its work on diplomatic protection by States before undertaking the study on the diplomatic protection exercised by international organizations.

19. The topic of unilateral acts of States was appropriate for the codification and progressive development of international law and should therefore be included on the agenda of the Commission. Slovenia agreed with the general approach taken by the Working Group, including the scope and content of the study to be undertaken. Obviously, the legal framework adopted by the Commission for unilateral acts had been inspired by the two Vienna Conventions on the Law of Treaties. One aspect of the classification of unilateral legal acts of States, namely, interpretive declarations, needed careful examination. Such declarations were becoming more frequent in treaty relations, and, while the Commission had already addressed that question under reservations to treaties, the notion and characteristics of interpretive declarations should be studied within the framework of unilateral acts of States. It was for the Commission to decide to what extent it would deal with those declarations as reservations and to find a way to accommodate them properly between reservations to treaties and unilateral acts of States.

20. **Mr. Loras** (France) said that he wished to add to the comments made by the French delegation the previous week. With regard to State responsibility, each State had been invited to submit comments in writing on the draft articles submitted by the Commission, and France would soon be submitting its comments on the topic. Therefore, he would limit his remarks to a few matters of principle that his delegation viewed as fundamental.

21. The general approach taken in the draft articles raised several problems. France had regularly stated before the Sixth Committee that the existence of damage was an essential element in the determination of State responsibility and that it was an integral part thereof. It had always been critical of the idea that a breach of an obligation, which was

poorly defined in the draft articles, would be sufficient to entail State responsibility.

22. The French delegation had also criticized several times the concept of "international crime" as defined in draft article 19, as well as the distinction between international crimes and delicts. It was difficult to deny that some illicit acts were more serious than others, but the distinction which the Commission had made between crimes and delicts was vague and unworkable. The Commission had also made little use of the distinction which it had established.

23. The expression "injured States", found in article 40, was ambiguous, and there again the emphasis should be placed on the concept of "damage".

24. As for the provisions regarding countermeasures, they were out of place in the draft. It was not clear that it was necessary to speak of countermeasures in a draft on State responsibility, since a text on responsibility should only include matters pertaining to that subject. The countermeasures regime could in itself justify a separate study by the International Law Commission.

25. France believed that the provisions on settlement of disputes were inappropriate. The third part of the draft had the effect of instituting a jurisdictional settlement of all disputes. However, there was no reason to single out disputes arising from questions of responsibility by applying an ad hoc dispute settlement mechanism to them. Moreover, most of the time there were no isolated disputes on responsibility, but rather substantive disputes with consequences in the area of responsibility. The third part was therefore inappropriate by definition. France did not see why there should be a specific dispute settlement mechanism linked to responsibility. It would be preferable to refer those matters to general international law. One solution would be to make the third part indicative, if not to delete it. It could then take the form of an optional protocol.

26. **Ms. Wong** (New Zealand) said that her delegation supported the suggestion of the Chairman of the International Law Commission that the Sixth Committee should hold informal meetings at its 1998 session to consider the topics addressed by the Commission. It also welcomed the fact that the Commission had focused on such questions as its cooperation with other bodies concerned with international law. Article 26, paragraph 2, of the Commission's statute stipulated that Commission documents should be distributed to international organizations concerned with international law and to at least one organization in each Member State. Article 26, paragraph 1, stated that the Commission could consult with any international or national organization on any subject entrusted to it. Those provisions could and should be implemented.

27. With regard to State responsibility, her delegation welcomed the work plan for consideration of the topic and the appointment of the Special Rapporteur. The topic of State responsibility was of fundamental importance, and the principles contained in the draft articles had already had a major impact on State practice, particularly article 4, which stipulated that the characterization of an act of a State as being wrongful in international law could not be affected by the characterization of that act as lawful by national law. That text was having an impact in the negotiations on a convention against terrorist bombing. The final form of that work could be either a treaty or a code.

28. The field of international liability for injurious consequences arising out of acts not prohibited by international law was constantly evolving and had major significance at the dawn of the twenty-first century. In the modern world, the failure to prevent damage to the environment could have serious consequences. Everyone was currently aware that the world did not have an inexhaustible supply of natural resources and that sustainable development must be promoted. Those who contributed to the codification and progressive development of international law in that field could not neglect the issue. The Working Group of the Commission had made significant progress on that topic in 1996, which had resulted in a set of draft articles on prevention. States had the obligation to prevent transboundary harm and to minimize risk, in particular through environmental impact assessments. Future work on the topic, however, should not be confined to prevention. If there was harm, there must be compensation. The polluter must pay. At its forty-ninth session, the Commission had decided to deal separately with the issues of prevention and international liability, but both aspects of the topic were equally important. By studying each with the same degree of care, the Commission would demonstrate that it was a modern organization prepared to take up the challenges of the twenty-first century.

29. **Mr. Cede** (Austria) said that his delegation had been pleased to learn that the Commission had established a working group on State responsibility, as the work on that subject should be finalized as soon as possible. The final results of that work could take the form of an international convention; however, a more flexible instrument, such as a guide for State practice, would also be possible. As for the content of the draft articles, the Commission had requested comments on such key questions as countermeasures and dispute settlement and for any lacunae in the draft to be identified. In the view of his delegation, the current draft was

already too comprehensive and, on the contrary, required some pruning. In particular, certain controversial provisions should be removed because they risked endangering acceptance of the draft. The third part of the draft could even be deleted.

30. When it revised the draft articles, the Commission should take care to avoid legal terms such as "fortuitous event", the scope of which had not yet been sufficiently determined by State practice. Since the aim was to prevent conflict between States, unclear legal terms that could promote controversy should be avoided. However, his delegation was generally satisfied with the overall approach, particularly of Part One, and with the general structure of the draft articles, with the exception of some specific provisions.

31. The draft articles in Part One, chapter II, which referred to the attribution of "acts of the State" under international law, seemed in general to be skilfully drafted. However, doubts remained as to whether the provisions of chapter II sufficiently covered the acts of natural and juridical persons who, at the time they committed a violation of international law, did not act as State organs but nevertheless acted under the authority and control of the State. Since States increasingly tended to entrust persons outside the structure of State organs with activities attributable to the State, a question arose as to whether the criteria established in chapter II for determining acts attributable to the State were too narrow. Answering that question would require a more thorough examination of recent State practice.

32. The issue of the conduct of organs of an insurrectional movement, contained in articles 14 and 15, left considerable doubt, particularly with regard to the provision in article 15, paragraph 1, concerning the attribution of acts of an insurrectional movement to a State. The relationship between the first and second sentences of that provision could produce curious results; for example, with respect to the events in Bosnia and Herzegovina, the application of that provision would make that State responsible both for its own acts and for the acts of the separatist movement currently represented in the Government pursuant to the Dayton Agreement. On the other hand, the experience gained in the wake of the breakdown of the iron curtain, in the former Yugoslavia and in other cases of civil unrest, should be studied with a view to the possible reformulation of those articles.

33. With respect to international crimes, his delegation continued to believe that little could be gained from such a notion in the context of State responsibility. It still preferred to delete article 19 and the provisions on the consequences thereof, which were contained in articles 51 to 53. If the General Assembly adopted such articles, it would run the risk of making the whole set of provisions on State responsibility less acceptable. Abuse of the notion of international crimes might, in practice, provide tempting pretexts for imposing disproportionately severe countermeasures and sanctions for even minor violations of international law. The notion of international delicts had no special importance, since any violation of international law entailing the responsibility of a State technically constituted a delict. The Commission should instead take a new approach to regulating the legal consequences of violations of international law, taking into account the seriousness of the violation and its sustained negative effects. In that regard, the possibility of seeking punitive damages should be studied on the basis of existing State practice.

34. In general, Austria preferred the "objective" approach taken in other areas of the draft articles, and felt that elements of domestic criminal law, including wilful acts, were out of place in the regulation of the legal relations between States. Any approach to State responsibility should never disregard the long-standing practice of the international community concerning measures which the latter could take under Chapter VII of the Charter of the United Nations, particularly with regard to violations of international law which threatened international peace and security. Moreover, State practices, including the efforts to establish an international criminal court, which were aimed at the prosecution of individuals, including State organs, that had committed criminal acts could provide a more effective tool against grave violations of basic norms of international law, such as human rights and humanitarian standards, than the criminalization of State conduct as such.

35. With respect to Part One, chapter V, which dealt with circumstances precluding wrongfulness, some States might have doubts about the practical relevance of article 29, paragraph 2, which excluded consent as a circumstance precluding wrongfulness in the case of *jus cogens*.

36. Article 31 also required more work; its current wording, which mixed objective and subjective elements, blurred the scope of *force majeure* or other external events as circumstances precluding wrongfulness. Austria therefore asked the Commission to consider to what extent the concept of material impossibility could be further developed so as to replace the notion of fortuitous events as a circumstance precluding guilt. The problems addressed by article 31 had far-reaching consequences that could relate to issues such as due diligence as a key element of the concept of prevention. Moreover, article 35 should be reformulated. To

the extent that it pertained to liability for acts performed in conformity with international law, its wording should be more specific, because otherwise it could undercut the effect of circumstances precluding wrongfulness. A provision applying the exception under article 35 only to such acts for which international law provided a legal ground for compensation would suffice. It must be borne in mind that the rules of international law governing liability and the duty to prevent damages still required extensive work by the international community.

37. With respect to Part Two, chapter I, the concept of an "injured State" developed in article 40 had merit to the extent that States were directly affected in their rights by violations of international law. The entitlement of a State to obtain reparation, restitution in kind or compensation should be made entirely dependent on whether that State had been directly affected in its rights by the violation. However, there was doubt as to whether the concept was also workable in cases where no directly affected State could be identified, such as the case of human rights violations and breach of obligations owed to the community of States as a whole. His delegation felt that the content of draft article 40, paragraph 2, subparagraphs (e) and (f), and paragraph 3, should be dealt with separately. The concept chosen in article 40 could lead to a competitive or cumulative competence of States to invoke legal consequences of a violation of international law. That could lead to absurd results, given the absence of a world authority to decide on the competence of States to invoke violations *erga omnes*. The right of States to invoke such violations should therefore be limited to specific legal consequences, such as the obligation to cease wrongful conduct or the satisfaction of the victims of violations of international law. Such a limitation on the competence of States seemed all the more preferable as the ability of the community of States, under existing international legal procedures, to react to violations of international law with effect *erga omnes* would remain unaffected by the rules governing State responsibility. In the case of violations *erga omnes*, certain problems must be addressed, such as the right of several States to invoke such violations concurrently and the legal consequences of the exercise of that right by one State for the rights of the other States concerned. Therefore, his delegation strongly urged the Commission to revise article 40 and Part Two, chapter II, of the draft articles.

38. Regarding chapter III of Part Two on countermeasures, it was necessary to improve the procedures stipulated in the provisions. His delegation welcomed the fact that its point of view concerning the obligation of the injured State to attempt to settle a dispute prior to taking countermeasures had been reflected in the reformulated version of article 48, paragraph 1. Nevertheless, given the general reluctance of States to submit to obligatory procedures for settling disputes, his delegation still had doubts about the efficiency of the proposed system. In the case of State responsibility, there was a danger that dispute settlement procedures, particularly those of a binding nature, might not work in practice. The question arose, therefore, as to whether the draft articles should be omitted from Part Three altogether. The procedure in article 48 on the obligation to negotiate could be retained, and a reference to dispute settlement procedures applicable between the injured and the wrongdoing State which already existed under international law could be inserted. As radical as such an approach might seem from a dogmatic point of view, it seemed to square with the direction followed by States in practice.

39. In taking such a realistic approach, the element of proportionality seemed to be of crucial importance. The principle of proportionality admittedly remained undetermined by international judicial authorities in terms of its scope, but it could not be denied that the mere fact that its invocation by a State against which countermeasures had been taken already provided a regulating effect. Furthermore, the jurisdiction of the International Court of Justice, particularly its advisory opinion on the legality of the use or threatened use of nuclear weapons, revealed the importance of that principle. The Commission might therefore further refine the provision on proportionality, at least in the commentary to the conclusive set of draft articles.

40. Whatever the result of the ongoing efforts to codify the rules of international law on State responsibility, an effort should be made to realize the following three objectives. First, the rules on State responsibility should play a decisive role in resolving international conflicts. They should help to influence State behaviour by minimizing instances which could develop into serious conflicts among States. Second, given the long history of the Commission's efforts to codify rules on State responsibility, an early conclusion of the work on that topic should receive high priority. The draft articles and the system adopted, with the exception of the elements mentioned above, provided an excellent basis, and hence new and complicated elements should not be introduced into the draft. Third, a flexible approach should be taken as far as the format of a future instrument on State responsibility was concerned, since all rules on State responsibility touched upon the basis of international law and should therefore strengthen it. The rules on State responsibility should therefore be set forth in the form of an instrument

restating the relevant rules of international law rather than in the form of an instrument requiring ratification by States.

41. Regarding chapter VII of the report, dealing with international liability for injurious consequences arising out of acts not prohibited by international law, the Commission, in deciding to separate its study of prevention from that of liability in the true sense, had opted for an approach which on the one hand seemed fully justified and, on the other, had various far-reaching consequences. It could not be denied that the two matters, international liability and prevention, were connected only indirectly, and it was justifiable to separate them for a number of reasons. Irrespective of whether liability constituted a primary or a secondary norm, it defined the consequences resulting from damage caused by activities which were lawful under international law. In that respect, reference could be made to draft article 35 on State responsibility, a link which was also reflected in the commentary on that provision. However, the draft on liability also included rules that were purely primary in scope, for example those concerning prevention, the violation of which would not entail liability but did fall within the sphere of State responsibility. It was therefore incorrect to combine prevention with a liability regime in the same draft unless a clear conceptual distinction was made therein. A separation of the two issues was also warranted on the grounds that they often dealt with different spheres of activity: prevention addressed almost all dangerous activities. Thus, Principle 21 of the Stockholm Declaration, which the Commission had already recognized as constituting existing law, did not distinguish different categories of activities. In contrast, it seemed appropriate to provide a liability regime only for those activities which were considered indispensable despite their dangerous nature. Such a regime would stipulate that damage which occurred despite precautionary measures need not be defrayed by society but should be compensated by the author of the damage. It was only in that way that the prevention and liability regimes were connected.

42. Concerning work on prevention, his delegation favoured a procedure under which the parameters and ramifications of prevention in international law would first of all be clarified and then assessed against the relevant draft articles already elaborated by the Commission. In that regard, it was impossible to ignore the difficulties of defining "hazardous acts" which would determine the scope of the provisions. At the same time, however, it was important not to lose sight of the original task, namely the elaboration of a regime of liability *stricto sensu*.

43. With regard to chapter VIII of the report, on diplomatic protection, his delegation appreciated the decision to focus the work on secondary rules. At the same time it was indeed evident that only indirect injury was concerned because, if a State suffered direct injury, it no longer invoked diplomatic protection but demanded reparation. Hence, the issue bore directly on the link between States and their nationals; interesting questions would have to be answered if such a link could not be invoked, as in the case of diplomatic protection by international organizations for their agents or by States on behalf of foreigners, either according to general international law or by agreement. With regard to the content of the topic as outlined in paragraph 189 of the report, with which his delegation was broadly in agreement, the only query was whether the "clean hands" rule quoted in chapter III A could really be regarded a generally accepted principle. However, the outline was only tentative and would certainly be reviewed in the light of comments made thereon.

44. The parameters of chapter IX, on unilateral acts of States, were not very clear to his delegation. The Working Group which had studied the topic had rightly pointed out that unilateral acts formed the basis of the diplomatic activity of States. International relations were to a great extent the result of such acts, and the imperatives of peaceful international coexistence, predictability and stability required that such acts should produce some legal effect. However, the work should be confined only to those acts whose main purpose was to produce legal consequences, since otherwise the concept would be practically indefinable. Moreover, the unilateral acts of international organizations should not be dealt with, and the same was true of acts connected with treaties since they were mostly governed by the law of treaties or the regime of the specific treaty. The topic was not an easy one, given that legal concepts such as recognition or promise themselves needed to be analysed in detail. It could even be queried whether the categories of unilateral legal acts enumerated in Chapter III of the outline had sufficient elements in common to enable them to be treated alike. Such questions should not deter the Commission from continuing its work, but in light of the difficulties his delegation welcomed the Commission's decision not to make a pronouncement on the final outcome, which might even take the form of a doctrinal study.

45. **Mr. Gray** (Australia) welcomed the progress made by the Commission in its consideration of the issue of the nationality of natural persons in relation to the succession of States. As a nation of immigrants, many of whom had dual nationality, Australia followed with interest the Commission's debate on the rules applicable in that area, which would add to the existing body of international legal rules aimed at preventing statelessness. He would submit his

Government's comments and observations on that topic to the Commission by January 1999.

46. On a related issue, he welcomed the proposed schedule of work on diplomatic protection. In his view, it was important to define diplomatic protection, a term of art whose scope was somewhat unclear. To that end, the Commission should examine, in the preliminary stages, the distinction between the diplomatic protection exercised by a State in espousing the cause of its nationals where local redress had been exhausted, which was the subject of the Commission's study, and the other forms of protection afforded by diplomatic missions. Circumstances might arise in which the exercise of diplomatic or consular functions of assistance and protection provided in accordance with the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations might be viewed by the host Government as an exercise of diplomatic protection, and, in cases of dual nationality, as being contrary to article 4 of the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws.

47. He welcomed the Commission's decision to examine the situation of customary international law relating to diplomatic protection in cases of multiple nationality and to determine whether article 4 of the Hague Convention was still applicable, since it might prevent a State from rendering consular assistance to one of its nationals in the other State whose nationality such person also possessed.

48. On the question as to whether the topic should cover forms of protection other than claims, he wondered whether article 4 of the Hague Convention might prevent a State from making diplomatic representations or exercising consular protection in circumstances involving matters which were precursors to a claim for diplomatic protection. The Commission might therefore wish to examine the issue of protective measures taken by a diplomatic or consular mission which might be precursors to a claim for protection. He also wondered whether the term "diplomatic protection" in article 4 of the Hague Convention did not cover a wider range of activities than the issue of "diplomatic protection" as it was currently understood, perhaps extending to the protection of human rights. The effective nationality criterion under that article also appeared to be applied with increasing frequency in determining the admissibility of a claim of diplomatic protection brought by a person with dual nationality. On the other hand, the traditional view, at least in certain common law countries, was that a State's right to exercise diplomatic protection was discretionary and that there was no individual right to such protection under domestic law. A different approach might consist of analysing the basis on which a national might claim a right to diplomatic protection. If such a right had become a human right, then it would accrue only to natural legal persons. It should also be borne in mind that it was States that determined the basis on which they attributed their nationality. In any case, an analysis of the views and practices of States was required before the rights of individuals to demand diplomatic protection could be recognized.

49. As to the protection claimed by international organizations in respect of their agents, it was based on the functional relationship between the organization and its agents. He had reservations about the extent to which the principles of diplomatic protection could be applied to the protection exercised by international organizations. The Commission might consider, at the preliminary stage, the relevance of privileges and immunities accorded to an international organization in the State in which the injury occurred, in particular, the availability of a remedy under the constituent instrument of the organization to which the respondent State was a party. Thus, a claim of diplomatic protection by a State would arise under general international law, whereas a claim by an international organization for injury to its agent might in certain circumstances arise under a treaty. It would also be useful for the Commission to specify the circumstances under which a State was deemed to have espoused a claim of diplomatic protection, since State practice indicated that States might take steps to protect or assist their nationals even when, strictly speaking, there was no entitlement to present an international claim. It would also be useful to examine the case of individual renunciations of offers of diplomatic protection or involuntary acquisition of the nationality of the State against which the claim was brought.

50. **Mr. Al-Baharna** (Bahrain), speaking on the topic of State responsibility, said that his country attached particular importance to the interrelationship between international crimes and delicts, countermeasures and the settlement of disputes, as well as to the identification of lacunae in the articles adopted on first reading, particularly in view of recent State practice. He supported the recommendations and procedural decisions adopted by the Commission, in particular its decision to appoint a Special Rapporteur. He shared the Commission's view that comments by Governments were particularly useful for the treatment of the topic and the preparation of the Commission's report. However, in view of the complexity of certain key issues, such as Part One, article 19 of the draft articles, and Part Two, article 47, the discussions on those issues, which he assumed to have been settled following the adoption of the aforementioned draft articles on first reading, should not be

reopened. He feared delays which would prevent the Commission from completing its work by the end of the quinquennium, as planned.

51. The legal consequences arising from an international crime were different from those arising from international delicts. Aggression, genocide and apartheid were all State crimes under article 19, even if they were perpetrated by State officials and not by the States themselves. State officials who had committed war crimes were individually liable to criminal prosecution. A State that was guilty of such crimes was liable to compensate the victims of such criminal acts. Article 47 on countermeasures by an injured State struck a balance between the interests of the injured State and the wrongdoing State, and set out the necessary criteria for limiting the scope of countermeasures that might be taken against the wrongdoing State.

52. He welcomed the fact that a Special Rapporteur had been appointed for the issue of prevention under the topic of international liability for injurious consequences arising out of acts not prohibited by international law, which had been the subject of many controversies, and had been on the Commission's programme of work for nearly 20 years; in his view, the issue of prevention should be considered separately. He therefore supported the Commission's recommendations and welcomed its decision to continue to retain the topic as one of the main items on its agenda, with a view to its progressive development and codification.

53. Turning to chapter VIII, on diplomatic protection, he once again welcomed the appointment of a Special Rapporteur on that topic. He agreed with the conclusions of the Working Group on that topic and urged States to make their views on it known. The study should be confined to the codification of secondary rules; it should therefore deal with the consequences of an internationally wrongful act which had caused an indirect injury to a State as a result of the direct injury suffered by its nationals, and owing to the limitations of the topic, should exclude primary rules. It should not include damages arising from an injury caused by a State to another State. Its scope should be limited to diplomatic protection in the sense of the espousal by a State of the claims of its nationals who suffered injury or were denied proper legal redress in another State; it should not cover the ordinary diplomatic and consular practices of States, which were already covered by the two Vienna Conventions of 1961 and 1963 on diplomatic relations and consular relations, respectively. In view of the *Reparation for injuries suffered in the service of the United Nations* case, the study should take into consideration the position of international organizations and their exercise of functional protection on behalf of their agents. The study could take the form of articles and commentaries which could be embodied in a convention or guidelines.

54. With regard to unilateral acts of States, he shared the Commission's view regarding the advisability and feasibility of a study on the definition of applicable legal rules, in the context of the codification and progressive development of international law. He agreed with the Working Group that State activities which did not carry legal consequences should be outside the scope of the study, as should internationally wrongful acts, which were covered under the topic of State responsibility. Also to be excluded were unilateral acts of States in the process of treaty formation, execution and termination, together with acceptance of the optional clause provided for in article 36, paragraph 2, of the Statute of the International Court of Justice, which were governed by the law of treaties. On the other hand, he did not exclude collective or joint acts by which States expressed the same willingness to produce effects without any need for the participation of other parties in the form of acceptance. Further, the reference, in the title of the topic, to States, implied that acts performed by international organizations were excluded, even though they were considered as subjects of international law.

55. He could not, however, support the view of the Working Group that internal acts that might have effects on the international plane, such as fixing the extent of the various kinds of maritime jurisdiction, should be included in the study, inasmuch as that sphere was already the subject of a well-defined legal regime based on the 1982 Convention on the Law of the Sea, which it would not be advisable to encroach upon. With respect to the proposal to change the title of the topic, his delegation thought it preferable to retain the current title, since it took up a term always used in textbooks, the word "legal" being understood. Moreover, the expression "unilateral legal acts of States" seemed to imply that there were two types of acts: legal and illegal. In addition, the term "legal" seemed to apply to the acts themselves, whereas it actually referred to their consequences, that being a further reason to retain the existing wording.

56. Lastly, he agreed with the programme of work set for the Commission, which proposed to complete its first reading of the text within the current quinquennium. As for the form which the study should take, he agreed that it should be determined on the basis of discussion and the preliminary conclusions of the Special Rapporteur.

57. **Mr. Borhan** (Egypt) welcomed the submission by the Commission of a set of articles on the nationality of natural persons in relation to the succession of States only four years

after inclusion of the topic in its agenda. That demonstrated its interest in topics of concern to the international community, which had recently witnessed a very notable increase in the numbers of successions of States and the problems relating to the nationality of natural and legal persons. His delegation was certain that the draft articles would help to guarantee the right of all individuals to a nationality, an object set forth in the Universal Declaration of Human Rights, as well as reduce cases of statelessness, as did the relevant convention.

58. His delegation welcomed the balance struck by the Commission between respect for the will of the individual regarding the choice of nationality where he fulfilled the requirements for different nationalities, and respect for the right of States to set conditions on the attribution of nationality, particularly where they did not allow dual nationality, with the general object of avoiding cases of statelessness. The Commission had recognized that nationality was primarily governed by national legislation, but that it was also a question of interest under international law.

59. The criterion of "appropriate connection" between the State and the persons concerned lacked objectivity and might well be interpreted differently depending on the State and thus result in new cases of statelessness. There was thus a need to establish precise criteria so as to avoid the arbitrary application of existing criteria, which would undermine the balance sought between the right of the State and the right of the individual. In general his delegation agreed with the use of the criterion of habitual residence for the attribution of nationality in connection with the succession of States, provided that habitual residence constituted an effective legal connection between the State and the person concerned. Further, while it was necessary to strike a balance between the right of the State to determine who its nationals were and the right of the persons concerned to acquire a nationality, the State was not obliged to attribute its nationality to those who did not show any desire to acquire that nationality or who could not explain why they had their habitual residence in another State. Moreover, his delegation was of the view that article 27 should be in part I of the draft articles, General provisions, and not in part II, on specific categories of succession of States.

60. With regard to chapter V of the report, the Vienna regime was the outcome of lengthy study by the International Law Commission in collaboration with the International Court of Justice, in particular its 1951 advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*. The regime was a good compromise between complete freedom to formulate reservations, which might undermine the object of the treaty, and the prohibition of reservations, which might well dissuade some States from acceding. His delegation endorsed the view of Mr. Pellet that the formulation of reservations to a treaty was an established right and that the Vienna regime, through its flexibility, maintained both the integrity of the text of the treaty and the universality of participation in it. There was no justification for not applying the regime to normative treaties and to human rights treaties, since the Vienna Convention had been drafted to apply to all categories of treaties and most human rights treaties concluded since the Vienna Convention contained, with respect to reservations, specific provisions referring to that Convention and using the purpose and object of the treaty as criteria. The Vienna Convention allowed States to formulate reservations to the provisions of a treaty that were contrary to their national legislation, provided that such reservations were not incompatible with the fundamental purpose and object of the treaty. Consequently, his delegation supported the Commission's preliminary conclusions on reservations to multilateral treaties, in particular paragraphs 6 and 7 concerning monitoring bodies established under multilateral treaties.

61. With regard to chapter VI on State responsibility, General Assembly resolution 51/160 had encouraged Governments to submit their views on the draft articles adopted on first reading, and he trusted that the Commission would begin its second reading at its next session so as to be able to complete its work within the five-year time-frame established, since the question was of great importance, particularly for many multilateral treaties. Similarly, his delegation hoped that the question of international liability for injurious consequences arising out of acts not prohibited by international law would be given greater priority over the next five years, as it had been on the Commission's programme of work for almost 20 years, which made it one of the oldest pending items, along with State responsibility.

62. Lastly, he welcomed the inclusion in the Commission's programme of work of the topics of diplomatic protection and unilateral acts of States, but at the current preliminary stage the Commission must not rule out the possibility of formulating guidelines or recommendations.

63. **Mr. Smejkal** (Czech Republic) said that his delegation had noted with satisfaction that the International Law Commission had adopted its preliminary conclusions on reservations to normative multilateral treaties including human rights treaties, which were contained in paragraph 157 of the report (A/52/10). The conclusions clearly and unambiguously underscored the unity of the regime of reservations and the full applicability of the Vienna regime

to normative treaties, including human rights treaties, a position which his delegation deemed to be the only valid one. In the light of recent variant interpretations, the Commission reaffirmed that the consensus basis was the foundation underpinning a State's willingness to be bound by a treaty.

64. The Commission also rightly believed that the legal force of the findings made by bodies established to monitor human rights treaties could not exceed that resulting from the powers given to them for the performance of their general monitoring roles. Accordingly, in the absence of an express provision to the contrary, such bodies, with the notable exception of certain regional bodies with broader powers, generally could only formulate observations and recommendations concerning reservations by States, and it was for the reserving States to draw the appropriate conclusions. Reservations most commonly were construed as actual conditions under which a reserving State would consent to be bound by a treaty and therefore were inseparable from that consent. His delegation welcomed the Commission's entirely appropriate invitation to monitoring bodies established by human rights treaties to offer their comments if they wished to do so.

65. With regard to State responsibility, his delegation recalled that it had addressed the issue in some detail in the Committee the preceding year and that its statement had focused on topics which the Commission now identified as fundamental problems on which the views of Governments would be particularly useful, namely, the concept of international "crime", countermeasures and the settlement of disputes. His delegation's position remained unchanged and it would provide it to the Commission in writing, as the General Assembly had requested.

66. With regard to international liability for injurious consequences arising out of acts not prohibited by international law, his delegation took note of the Commission's decision to consider the "prevention of transboundary harm" aspect of the topic first, while retaining the topic on its agenda as initially conceived and under the longer title pending receipt of additional comments from Governments on the "liability" aspect, which should help it reach a final decision on the matter. The Commission's confusion was understandable: the "liability" aspect definitely was a key component of the topic in question and was of considerable practical import as well. However, the topic, which was relatively poorly defined in judicial practice and doctrine, was controversial and invited conflicts which spring, *inter alia*, from differing interpretations of the matter under different systems of national law and entailed clashing theories with respect to risk, liability, abuse of rights and breaches of good-neighbourliness, to cite only a few; such clashes significantly clouded the question as to what regime was applicable at the international level. Even if the crux of the problem was defined in terms of primary rules, the fact remained that the meaning of "*sic utere tuo ...*" was very difficult to interpret in positive international law. Accordingly, his delegation believed that the Commission's decision to separate the two aspects of the topic, at least temporarily, was appropriate and would at least allow progress on the "prevention" aspect. With regard to prevention, his delegation noted that the subtitle referred to hazardous activities and that the preceding year it had suggested limiting the scope of the articles for both aspects of the topic to activities involving risk. The inclusion of activities not involving known risks obviously would be meaningless for an examination of prevention alone, but his delegation understood why the Commission appeared to limit the scope of prevention even further by using the term "hazardous activities" rather than activities "involving risk".

67. With regard to diplomatic protection, his delegation had noted with interest the report of the Working Group and the outline of the topic's content, with which it was in general agreement. At least at the current stage of the Commission's work on the topic, the functional protection extended by international organizations towards their agents should be considered along with diplomatic protection per se, since the initial results would supply the clarification needed for the subsequent adoption of a final decision on the inclusion of functional protection. In international jurisprudence, functional protection had been broadly based on the model of diplomatic protection, although certain specific elements had been naturally retained. Moreover, it would be useful to explore the connection between the two types of protection during the initial phase of consideration of the topic. In reply to another specific question posed by the Commission in paragraph 33 (a) (chap. III) of its report calling for the comments of Governments on chapter one of the proposed outline contained in paragraph 189 of the report, he said that his delegation was satisfied with the outline as currently drafted; in addition, it supposed that the effect of State succession on the exercise of diplomatic protection would be studied in the context of section A.1 of chapter one of the outline. It also believed that attention usefully could be paid in the context of the topic to the concept of the "law peculiar to" the State of which a private victim was a national, which formed the basis of diplomatic protection, by taking into account recent criticisms of the "law peculiar to" concept and the implications for different aspects of diplomatic protection, including the Calvo clause, the question of the consent of a private victim, including

"class action" cases, the extent of damage, the distribution of settlements, or the applicability of the transaction with respect to a private victim where the latter had not yet exhausted its direct legal remedies against the State concerned.

68. The topic of unilateral acts of States dealt with in chapter IX of the report generated some troubling questions. The Commission was turning its attention to the topic at a time when States were increasingly carrying out unilateral acts in the conduct of their international relations, to such an extent that unilateral acts had been considered, with slight exaggeration, to have at least partially supplanted treaty-based conduct in relations among States. The topic was at first glance so broad that it was essential to delimit its content and scope. In that connection, his delegation understood why the Commission suggested excluding certain acts, such as accession to, reservations to or denunciation of a treaty, which simply involved the formation, amendment or termination of treaty commitments and therefore were already adequately regulated by the law of treaties. His delegation also believed that all acts which were unilateral (meaning that they emanated from a single State) but did not by themselves have any effects, did not constitute true autonomous engagements. Those might, for example, include so-called "condition acts", which merely triggered the application of a legal regime defined independently of them. It also was necessary to exclude international juridical events, such as various notifications which did not entail an intention on the part of the author to become bound thereby, including fairly common situations in which internal juridical acts became, at the international level, simple juridical events.

69. Whatever the final scope of the topic turned out to be, his delegation would follow with particular interest the Commission's work on the regime of unilateral acts, particularly the question of their revocability. The binding character of a unilateral act and its autonomy as a source of law would appear to be singularly fragile, if not illusory, if it could be terminated at any time by a unilateral revocation, which the principle of the autonomy of will and the rule on the parallelism of forms seemed to suggest was the case. However, he wondered whether the concept of good faith alone was sufficient to limit unilateral revocability, and to what extent. And, ultimately, another question that arose was whether, it was not in fact necessary to view an engagement undertaken by virtue of a unilateral act as akin to treaty-based conduct, by presuming the tacit acceptance by the beneficiary of the right created (or the tacit acceptance by the debtor of the obligation where an author unilaterally renounced a right), or estoppel, which indirectly introduced an element of reciprocal obligations. With respect to the unilateral acts of international organizations, the title of the topic automatically eliminated them. His delegation endorsed that approach because it believed that such acts, or at least the great majority of them, which were carried out in exercise of an organization's normative or quasi-normative powers, related to an entirely separate topic which should be dealt with separately. Lastly, as to the final form which the outcome of the Commission's work on the topic should take, i.e., a doctrinal study followed by draft articles, general conclusions or guidelines, it was premature at the current stage to offer even tentative suggestions.

70. **Mr. Szénási** (Hungary), referring to chapter IV of the Commission's report (A/52/10), said that the Hungarian delegation wished to congratulate the Commission for having successfully completed, in a short period of time, the first reading of a draft preamble and 27 draft articles on the topic of nationality in relation to the succession of States. Mr. Mikulka, the Special Rapporteur, deserved a special tribute. In view of the turbulent changes of the past few years, the impact of State succession on the nationality of natural persons had been and continued to be a very sensitive political and legal problem, especially in Central and Eastern Europe. For that reason, his country attached particular importance to the topic and welcomed the results of the Commission's most recent session, which represented a major step forward in the endeavour to formulate a document aimed at preventing statelessness. Although his delegation planned to respond to the Commission's request to Governments for comments and observations, it wished to offer a few general comments.

71. His delegation fully supported the approach of the Commission which, although it took due account of the legitimate rights and interests of States and individuals, also safeguarded the human rights of the persons concerned on the basis of the argument contained in paragraph 7 of the commentary. That approach was evident not only in the preamble, but also in various provisions, for example, article 10, which attributed a role to the will of the individual; article 11, which protected the unity of the family; article 12, which recognized the rights of the child; article 13, which protected habitual residents from the negative consequences of State succession, in particular from the forced transfer of residents and ethnic cleansing; and, lastly, article 14, which forbade discrimination on any grounds, a provision aimed at protecting minorities. His delegation had noted with interest that in defining the link which must exist between the persons concerned and the State involved, the draft used different terminology in various articles. For example, article 10, which sought to prevent statelessness, used the term

"appropriate connection" and did not use the stricter criterion of "effective link". On the other hand, article 18, which dealt with the rights of other States not to give effect to the decision of a State concerned, used the concept of "effective link". At the same time, his delegation was convinced that, in order to avoid problems of interpretation, no effort should be spared to establish objective criteria which could be applied universally in the text. The Committee also should bear in mind the phrase "genuine and effective" nationality, a term first used by the International Court of Justice in the Nottebohm case, and which also was contained in subparagraph 2 (a) of article 18 of the European Convention on Nationality recently adopted within the framework of the Council of Europe.

72. Bearing in mind the profound changes which had occurred in recent years in the vicinity of his country, his delegation eagerly welcomed the equivalent paragraphs (b) of articles 22 and 24, applicable respectively to the dissolution of a State and to the separation of a part or parts of its territory. In the case of a pre-existing link, such as place of birth, the last habitual residence in the territory of the predecessor State or any other appropriate connection of a similar nature with the successor State, the paragraph provided that successor States would attribute their nationality to all persons concerned, as the expression was defined by article 2 (f), even if they had their habitual residence in the territory of another successor State or in a third State. By so doing, the draft addressed the difficult situation which arose when successor States did not wish to attribute their nationality to the persons concerned or when they established conditions for the acquisition of their nationality which could not be met.

73. With regard to the format which the results of the work on the topic would take, his delegation noted that the Commission had added a preamble and that article 2 indicated that the format had not yet been formalized; the Commission therefore could still move beyond a declaration of the General Assembly consisting of articles with commentaries.

74. With regard to chapter V of the report, on "Reservations to treaties", which was one of the most important items on the Commission's agenda, Mr. Pellet, the Special Rapporteur, deserved congratulations for having produced two excellent reports on the subject and a draft resolution which was the basis for the "preliminary conclusions of the International Law Commission on reservations to normative multilateral treaties including human rights treaties" adopted by the Commission. His delegation endorsed those conclusions. Indeed, it agreed with the Special Rapporteur and the Commission that the major rules of the "Vienna regime" on reservations established by the 1969 and 1986 Conventions remained applicable to multilateral treaties including normative treaties. It endorsed the cautious approach of the Commission in adopting "preliminary conclusions" instead of a resolution. That allowed for any flexibility that might be required. His delegation also agreed with the Commission that reservations should continue to be governed by articles 19 to 23 of the Vienna Convention of 1969, since they struck a balance between the objective of preserving the integrity of the text of the treaties and the universality of participation in those treaties. Nevertheless, it was convinced that important new developments had occurred in the field of treaty relations since the adoption of the Vienna Convention of 1969 on the Law of Treaties, in particular, in the field of human rights.

75. It was well known that the issue of the admissibility of reservations to human rights treaties had been the centre of attention during the Commission's deliberations. He commended the Commission for having found a reasonable compromise in paragraph 5 of its conclusions which acknowledged the powers of the monitoring bodies established by human rights treaties. To reach that compromise, the Commission had had to alter the original draft of the Special Rapporteur, according to which the monitoring bodies would have had competence to carry out a determination function with respect to the permissibility of reservations (A/CN.4/477/Add.1, para. 260). It should also be recalled that, as a corollary to that position, in paragraph 12 of its conclusions, the Commission emphasized that they "were without prejudice to the practices and rules developed by monitoring bodies within regional contexts". The consideration of the nature and legal effects of reservations to human rights treaties had been prompted by certain positions taken by monitoring bodies established by human rights treaties. In recent years, those bodies had started to assess the permissibility of reservations formulated by States to the instruments under which they had been established. There was no time to examine in depth the role and competence of monitoring bodies established by human rights treaties and he therefore could not explain his delegation's position on a number of important issues, such as general comment No. 24 adopted under article 40, paragraph 4, of the International Covenant on Civil and Political Rights by the Human Rights Committee in 1995, or the position concerning that general comment taken by several States and the Special Rapporteur himself. In that connection, he referred members to document A/50/40 (annexes V and VI), A/51/40 (annex VI) and to the second

report of the Special Rapporteur (A/CN.4/477/Add.1). Nevertheless, several points were worth emphasizing.

76. In recent years, Hungary had consistently supported the strict observance and full application of human rights treaties. It had become party to the Optional Protocol to the International Covenant on Civil and Political Rights in 1988 and to the Convention for the Protection of Human Rights and Fundamental Freedoms and the Additional Protocols thereto in 1992. It was doing its best to cooperate with other like-minded States within the framework of European regional organizations, especially the Council of Europe, to ensure strict compliance with treaty obligations undertaken by States in the field of human rights, including minority rights, and humanitarian law in general. Hungary also supported the Commission's programme of work in the field of reservations. It therefore looked forward to the two new reports to be submitted by the Special Rapporteur in 1998 on the definition of reservations and on the effects of reservations, acceptances and objections to reservations.

77. **Mr. Herasymenko** (Ukraine) said that his delegation duly appreciated the research undertaken by the Special Rapporteur on the topic of reservations to treaties and the conclusions which he had formulated. Several aspects of the problem had yet to be clarified, however, including the definition of the inadmissibility of reservations to treaties and the consequences of inadmissibility. It supported those members of the Commission who believed that the Vienna regime did not provide for a procedure for formulating reservations and objections thereto nor did it provide a method for defining the admissibility of reservations. The determination of the admissibility of a reservation was a prerogative of States and only States could define the consequences of the inadmissibility of reservations. Only if States failed to do so should the opinion and recommendations of the monitoring bodies come into play. The activities of monitoring bodies, however, should be strictly limited to the scope of their competence and no additional authority should be attributed to them except in accordance with treaty provisions.

78. With regard to reservations to bilateral treaties, it was difficult to agree with the logic of such reservations, since it was obvious that a reservation to a bilateral treaty amounted to a unilateral change in its text without the consent of the other party. His delegation supported the idea expressed by several members of the Commission that research should be carried out on interpretative statements, since that would help to draw a clear distinction between such statements and reservations.

79. His delegation welcomed the Commission's deliberations on the topics of unilateral acts of States and diplomatic protection. The first topic was of particular interest to Ukraine. The well-known solemn declaration by the Parliament of Ukraine on the non-nuclear status of that country was an excellent example of a unilateral act and its consequences for Ukraine and the entire world were significant. With regard to diplomatic protection, it might be expedient to study the principles of diplomatic protection of persons with dual citizenship.

80. Among the important issues considered by the Commission at its most recent session, the Ukrainian delegation attached particular importance to the topic of the nationality of natural persons in relation to the succession of States. In Ukraine's opinion, the text prepared by the Commission reflected more or less adequately the contemporary practice of States and constituted a solid basis for further discussions. Ukraine supported the basic approach underpinning the whole body of draft articles, which was an emphasis on human rights, including the right of every person to a nationality. It also endorsed the general presumption which was at the core of the draft articles, namely, the attribution of nationality primarily on the basis of the habitual residence of the persons concerned in the territory affected by succession, as well as the principle according to which the acquisition of nationality took effect on the date of succession. Ukraine had also adopted that approach in its legislation on succession and citizenship by attributing its nationality in the first instance to those persons who resided permanently in the territory of Ukraine either on the date of succession or on the date of the adoption of the respective legislation. Draft article 4 seemed to convey the same idea in more general terms.

81. Several of the provisions of the draft articles on nationality raised questions of a legal nature for the Ukrainian delegation and might produce problems if applied in practice. Firstly, the exact meaning of the principle of non-discrimination with respect to nationality remained very unclear in the text of article 14. As Ukraine understood it, the principle should be interpreted in that context as non-discrimination on the grounds of race, colour, political or religious convictions, sex, ethnic or social origin, language or property status. It might be useful to add such a clarification, which might influence the actual application of the principle.

82. The Ukrainian delegation was also concerned that some States might use the occurrence of succession to extend their jurisdiction into the territory of other States by attributing their citizenship to persons concerned residing in the territory of such other States. Regrettably, the draft

did not prevent such a possibility. For example, article 7, paragraph 2, which did not have a saving clause like the one found in paragraph 1 of the same article, if interpreted literally, required a successor State to attribute its nationality to persons concerned who had their habitual residence in another State against the will of such persons, if they would otherwise become stateless. In addition to being in contradiction to article 10, paragraph 2, such a stipulation was fraught with dangerous consequences for the sovereignty of the other States concerned and opened the door to abuse.

83. Like many other delegations, Ukraine held the view that the use of the term "appropriate connection" throughout the draft text, particularly in article 10, on the right of option, created undesirable connotations and variations of interpretation, which could not be justified. It was preferable to employ instead the well-established term "effective link", which was also found in article 18. Even while employing an unsuitable term, article 10, paragraph 2, still provided for reasonable restrictions on the rights of persons concerned to opt for a nationality. That position seemed tenable and acceptable inasmuch as it satisfied the main objectives pursued, namely, to reduce to the maximum possible extent the cases of statelessness as a result of State succession and to find a balance between the legitimate interests of successor States in regulating a broad range of issues connected with the attribution of their nationality and the right of natural persons to opt for the nationality of one of the successor States. At the same time, the principle set out in article 10, paragraph 2, which was supposed to have general application, was completely denied by article 23, paragraph 2, which concerned the right to opt for nationality in case of the dissolution of a State. In practical terms, that language provided for the right of all persons concerned, regardless of their actual status or the existence of effective links with a particular State, to opt for the nationality of that State. In that respect, article 23, paragraph 2, should be seriously reconsidered, if not completely eliminated.

84. His delegation also had serious reservations with respect to article 27. It was not completely clear why it was necessary to include in the draft, which had a direct reference to human rights and fundamental freedoms, a provision similar to those found in the two Vienna Conventions: the legitimate interests and rights of individuals to a nationality and unity of the family, for example, must be protected regardless of whether or not a succession of States had occurred in conformity with international law. Finally, with regard to the status of the instrument to be adopted as a result of the work on the topic, Ukraine believed that it would be preferable to give the draft articles the form of a binding international agreement, as had been the case with the two previous Conventions on succession of States. He wished to underline that his observations were of a preliminary nature and that Ukraine would submit its commentaries in writing, as the Commission had requested.

The meeting rose at 6.15 p.m.